IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 1068
Criminal.

MEYER EASTMAN, Alias "MEYER ESSTMAN",
and DAVE MARGLOUS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
For the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

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To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now Meyer Esstman and Dave Marglous, petitioners, and respectfully petition this Honorable Court to grant a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, and respectfully show to this Honorable Court as follows:

SUMMARY STATEMENT OF MATTER INVOLVED.

The problem presented here is whether petitioners were properly convicted of a crime under Section 3 (c) of the Federal Alcohol Administration Act, 49 Stat. 978, Title 27 U. S. C. App., Section 203 (c) (1).

This case involves the construction and application of that section, which reads as follows:

> "(c) It shall be unlawful, except pursuant to a basic permit issued under this chapter by the Secretary of the Treasury—
>
> "(1) to engage in the business of purchasing for resale at wholesale distilled spirits, wine, or malt beverages;"[1]

Petitioners and one Jake Hendin were jointly indicted on September 15, 1944, the indictment containing 14 counts (R. 15-36). The fourteenth count charged that on or about June 7, 1943 petitioners and Jake Hendin, as co-partners and employees, doing business as Peoples Liquor Store, wilfully and knowingly engaged in the business of purchasing distilled spirits for "resale at wholesale" in that petitioners and Hendin engaged in the business, and not in pursuance to a basic permit, of purchasing distilled spirits for resale in wholesale quantities to retail liquor dealers who purchased said distilled spirits for the purpose of sale and thereafter did sell such spirits so purchased from petitioners (R. 35-36).

The first thirteen counts of the indictment charged the petitioners and Hendin with knowingly, willfully and feloniously making false entries on Treasury Department Form 52b (R. 15-35).

At the close of the Government's case the petitioners moved for a directed vedict on each count of the indictment, but this motion was overruled as to Count 14. Thereupon petitioners declined to offer any evidence (R. 47). By direction of the Court, petitioners and Hendin were acquitted on the first thirteen counts; the jury found all defendants guilty on the fourteenth count (R. 11). Appeals were duly taken by petitioners and Hendin to the

[1] Title 27, Code of Federal Regulations, Sec. 1.1, defines "resale at wholesale" as meaning a sale to any trade buyer. A trade buyer is any person who is a wholesaler or retailer. Title 27, U. S. C. App., Sec. 211.

Circuit Court of Appeals for the Eighth Circuit on January 10, 1945 (R. 1, 5). On January 16, 1946, the Circuit Court of Appeals affirmed the judgment of conviction as to petitioners and reversed the judgment as to Hendin (R. 325). A petition for rehearing was duly filed on January 31, 1946 (R. 351). This petition was overruled by the Court on March 4, 1946 (R. 353).

The evidence offered by the Government which the Circuit Court of Appeals held sufficient to prove that petitioners violated the statute as charged in the indictment is as follows:

Petitioners are partners who own a retail liquor business in St. Louis, operating under the name Peoples Liquor Store (R. 62). They purchased a wholesale liquor dealer's stamp to enable the firm to sell distilled spirits in any quantity in excess of five wine gallons (R. 63). No retail liquor dealer may validly sell liquor in such quantities without obtaining such a stamp. The store in question conducted a rather extensive retail business on principal thoroughfares of the City of St. Louis, Missouri, employing some 7 to 9 clerks (R. 202). All sales, irrespective of the quantity involved, are made on the premises of the store and the purchaser takes possession at the store, no deliveries being made. The purchasers make their own arrangements for hauling the liquor from the store (R. 151). Each month, in compliance with the Internal Revenue Code and regulations, petitioner Esstman executed and filed a report of all sales made by the store in excess of five wine gallons, the reports showing the dates of the sales, the amount and description of the items purchased, and the names and addresses of the purchasers as given to the clerks (R. 65, 69, 75, 77, 83, 87).

The Government introduced direct evidence concerning only two sales made at petitioners' store. One was to Fannie Gladdish, who purchased 12 cases of whiskey on

July 7, 1943. She testified that she was the manager of a tavern and the holder of a liquor license, and that after the purchase was made she had personally taken the liquor from the premises of the Peoples Liquor Store to the stockroom of her tavern (R. 194, 198). Her dealings were with one of the clerks in the store (R. 197, 202), but there was no evidence by the witness or anyone else that the clerk or the petitioners had any knowledge that Fannie Gladdish was a liquor dealer or that she intended to resell the liquor. The report of the sale made by petitioners contained the witness' correct home address, which was not that of the tavern (R. 196, 202).

The other sale, concerning which testimony was adduced, was to a P. H. Clark in June, 1943. A witness, P. H. Carlisle, testified with respect to this sale. He accompanied a man named Sanders to the petitioners' store and Sanders carried on the sales transaction. Sanders did not testify, and Carlisle stated he did not hear what was said. A purchase of one hundred cases of liquor was made at this time (R. 231). Carlisle testified that at the date of the trial (which was December 19, 1944), he operated a tavern in Joplin, Missouri (R. 219). There was no evidence as to whether Carlisle was a liquor dealer at the time the purchase was made or as to whether Carlisle intended to resell the liquor or what his purpose was with respect thereto. There was no evidence that petitioners or any of their clerks knew that Carlisle was not Clark, the name given by him, or that Carlisle intended to resell any liquor, if such was his intention.

Monthly reports required to be filed by the holder of a wholesale liquor dealer's tax stamp concerning sales of liquor in excess of five wine gallons covering the period of eight months from April to November, 1943, inclusive, was offered in evidence by the Government (R. 108, 65, 67, 69, 75, 77, 83, 87). These reports disclosed a total of 37 sales, the number varying from month to month. There were no

reports of any sales at all of this amount for the three consecutive months of August, September and October, 1943. Of the 37 sales, 20 were of less than 10 cases each, 7 were sales of from 10 to 25 cases each, and 10 were sales of 50 or more cases (6 of the 10 being 100 or more cases each).

Other than the testimony given with respect to the Gladdish and Clark transactions, there was no evidence of the circumstances surrounding any of the sales reported by petitioners nor was there any evidence of the occupation or purpose of the purchasers. There was evidence that ten of the purchasers could not be found or their purchases verified, but there was no evidence that the petitioners knowingly falsified their records or knew that any name or address on the reports was incorrect. In this connection the trial court directed a verdict of acquittal with respect to falsifying the records (R. 253, 268).

There was no evidence offered by the Government to show the fact that, or the time when, petitioners purchased any distilled spirits for sale at their store for any purpose. It was conceded that the petitioners did not hold a basic permit, their position being that no permit was necessary in view of the nature of their operations.

The trial court in its charge to the jury quoted the indictment and the statute, and stated the issue for determination by the jury, as follows:

> "The issue, boiled down, is the charge by the government that they (petitioners) sold intoxicating liquors at wholesale for resale purposes, and that charge is denied by the defendants" (R. 264-266).

The Circuit Court of Appeals for the Eighth Circuit held that 1) proof of the sale to Fannie Gladdish, 2) the testimony of Carlisle concerning his purchase, and 3) evidence of the other large volume sales as shown on petitioners' monthly reports justified the conclusion that peti-

tioners sold to dealers; that because the quantities reported as sold were greatly in excess of "normal individual consumption requirements" and some of the purchasers could not be located the following year, the jury was justified in concluding that petitioners knew the purchasers were dealers and knowingly made sales to trade buyers; and hence that petitioners were engaged in purchasing their liquor for sale to trade buyers in violation of the statute.

JURISDICTION.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C., Section 347 (a)] and Title 18 U. S. C., Section 688, and Rule 11 of the Criminal Rules promulgated pursuant thereto.

The judgment and opinion of the Circuit Court of Appeals sought to be reviewed was entered January 16, 1946 (R. 325). A petition for rehearing was duly filed January 31, 1946 (R. 351), which was denied on March 4, 1946 (R. 353). This petition for writ of certiorari is filed within the period provided therefor under the rules of this Court.

THE QUESTIONS PRESENTED.

1. Is proof of sales of liquor in quantities in excess of "normal individual consumption requirements" sufficient to sustain a conviction for engaging in the business of purchasing liquor for resale at wholesale where there is no evidence as to when petitioners purchased liquor or that they had any knowledge of the occupation and intent of any of their customers and no evidence is offered to show the actual occupation and intent of any except a single customer?

2. May the Act properly be construed as prohibiting sales of liquor in quantities in excess of what an Appellate Court deems "normal individual consumption requirements" unless the dealer sustains the burden of proving that such sales are made to others than trade buyers? Is such a standard of guilt too vague, indefinite and uncertain to chart a course of conduct, particularly where no person has advance notice thereof or of the meaning of such a standard? Does such a construction of the Act authorize a conviction to rest upon surmise, speculation and suspicion?

3. May a conviction for engaging in the business of purchasing distilled spirits for resale at wholesale be sustained where there is no evidence that petitioners purchased any distilled spirits for any purpose whatever or that they purchased any within the period of limitations, as well as a lack of evidence that petitioners at any time purchased any distilled spirits for other than retail purposes?

4. In order to sustain a conviction for engaging in the business of purchasing distilled spirits for resale at wholesale in violation of Section 203 (c) of the Federal Alcohol Administration Act, is it permissible:

(a) To infer from the fact alone that a retail liquor dealer lawfully makes sales pursuant to his wholesale liquor dealer's stamp, in quantities in excess of what an appellate court deems to be "normal individual consumption requirements," that the purchasers are trade buyers, and

(b) Upon the basis of such assumption further infer from the same fact of lawful quantity sales that the retail liquor dealer knew the purchasers were actually trade buyers, and

(c) Upon the basis of the assumption that the retail liquor dealer knew he was selling to trade buyers further infer that the liquor so sold was originally purchased by him for the purpose of resale to trade buyers?

Does the drawing of inference upon inference and basing one presumption upon another result in a conviction which is based upon speculation, surmise, suspicion and conjecture?

5. Was the evidence sufficient to support the jury's determination that petitioners violated the Act where the proof consists only of evidence showing:

(a) That petitioners operated a large retail store and had purchased a wholesale liquor dealer's stamp;

(b) That a clerk in petitioners' store made a single sale of twelve cases of liquor to a purchaser who held a liquor license, but was not known to petitioners or their clerk to be a dealer;

(c) That over a period of eight months a total of 37 sales were made at petitioners' store of liquor in various quantities in excess of five wine gallons each as authorized by their wholesale stamp;

and there is no evidence that petitioners or their clerks

knew or had reason to believe that any purchaser was a trade buyer or that petitioners would knowingly have sold to trade buyers?

6. Does Section 203 (c) of the Federal Alcohol Administration Act require a basic permit of a retail liquor dealer who does not receive, sell, offer or deliver for sale, contract to sell, or ship any distilled spirits in interstate or foreign commerce, in order that such dealer after purchasing a wholesale liquor dealer's stamp may validly sell liquor in intrastate commerce in quantities in excess of "normal individual consumption requirements"?

7. Is there any substantial evidence to support the conviction of petitioner Dave Marglous?

8. Is there any substantial evidence to support the conviction of petitioner Meyer Esstman?

9. In a prosecution for knowingly and willfully engaging in the business of purchasing liquor for resale to liquor dealers in violation of Section 203 (c) of the Federal Alcohol Administration Act, is the charge to the jury proper, fair and adequate where it merely quotes the indictment and statute involved and states that the issue for determination is whether petitioners sold to trade buyers?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

The Circuit Court of Appeals for the Eighth Circuit has in effect construed Section 203 (c) (1) of the Federal Alcohol Administration Act as prohibiting a retail liquor dealer who has purchased a wholesale liquor dealer's stamp from making sales of liquor in quantities in excess of what the Court deems "normal individual consumption requirements" unless the dealer sustains the burden of proving to the satisfaction of the Court and the jury that those who purchase from him are not in fact trade buyers. The Court has thus decided an important question of Federal law involving the construction and application of the Federal Alcohol Administration Act which has not been but should be decided by this Court.

The evidence showed only that one sale of twelve cases of liquor was made to a trade buyer who was not known to petitioners to be such, and that other sales were made in quantities found by the Circuit Court of Appeals to be in excess of "normal individual consumption requirements." These sales, in the absence of an explanation by petitioners, were held of themselves sufficient to prove that the purchasers were trade buyers known by petitioners to be such. There was no evidence at all of any purchases of liquor made by petitioners.

The importance of the decision in this case extends far beyond the petitioners who are immediately involved. It directly affects every retail liquor dealer who, having obtained a wholesale liquor dealer's stamp, makes sales in quantities authorized by such stamp. As the Act is construed by the Circuit Court of Appeals an intolerable burden is placed upon such retail liquor dealers. They can-

not now conduct their business without peril of prosecution and conviction against which they cannot effectively protect themselves except by abandoning sales pursuant to their wholesale tax stamp.

The Act prohibits a person who has no basic permit from engaging in the business of purchasing distilled spirits for resale at wholesale. By regulation the words "resale at wholesale" are defined as meaning sales to trade buyers. No regulation makes the quantity sold a factor to any extent whatever. The Circuit Court of Appeals, however, has made the quantity sold the determining factor by setting up as the standard "normal individual consumption requirements." This is a standard which is previously unknown to the law and so vague and indefinite that a liquor dealer must guess as to its meaning and application.

There is no departmental regulation which puts the dealer on notice that quantity sales are in themselves improper or unlawful, or which imposes a duty on the dealer of investigating and determining at his peril the identity, occupation and purpose of his customers. Yet the Circuit Court of Appeals in effect requires the dealer to conduct such an investigation and be subject to conviction if he makes no investigation, or if his investigation in the opinion of the Court or jury is not sufficiently thorough.

Petitioners submit that there is urgent need of an authoritative and elucidating decision by this Court construing Section 203 (c) of the Act in its application to retail liquor dealers.

II.

The decision of the Circuit Court of Appeals for the Eighth Circuit that the evidence was sufficient to support the conviction of petitioners is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in the

case of **Supreme Malt Products Co. v. United States**, 153 Fed. (2d) 5, decided January 15, 1946. The First Circuit held that evidence that a retail dealer in the course of its business of making sales pursuant to its wholesale stamp made a sale of liquor to a dealer with actual knowledge that the liquor was to be resold is insufficient to warrant a conviction under the Act, in the absence of other circumstances from which the jury could find that the defendant either intended to sell or had sold liquor at wholesale to a buyer intending to resell the same in other instances.

III.

The decision of the Circuit Court of Appeals for the Eighth Circuit that evidence to the effect that petitioners made sales in quantities in excess of "normal individual consumption requirements" is sufficient to support a conviction for engaging in the business of purchasing liquor with intent to resell the same to trade buyers is in conflict with applicable decisions of this Court holding that no one should be required to guess as to the acts and conduct constituting the crime and that a reasonably ascertainable standard of guilt must be prescribed. Such cases are:

Connally v. General Construction Co., 269 U. S. 385;
International Harvester Co. v. Kentucky, 234 U. S. 216;
Weeds, Inc., v. United States, 255 U. S. 109;
United States v. L. Cohen Grocery Co., 255 U. S. 81;
Cline v. Frink Dairy Co., 274 U. S. 445;
Lanzetta v. New Jersey, 306 U. S. 451;
Herndon v. Lowry, 301 U. S. 242;
Stromberg v. California, 283 U. S. 359.

Such decision is also in conflict with the applicable decisions of this Court in **M. Kraus & Bros., Inc., v. United**

States, decided March 25, 1946; **United States v. Resnick**, 299 U. S. 207; and **United States v. Wiltberger**, 5 Wheat. 76, holding that no conduct is criminal unless it is plainly within the statute, and that there are no constructive court-made offenses.

IV.

The decision of the Circuit Court of Appeals for the Eighth Circuit that the jury could infer from the fact of quantity sales that the purchasers were trade buyers, and upon that presumption and the fact that some purchasers could not be found, further infer that petitioners knew the purchasers were actually trade buyers, and upon the basis of both such presumptions further infer that the liquor sold was purchased by defendants with the intent to sell the same to trade buyers is in conflict with the applicable decision of this Court in **United States v. Ross**, 92 U. S. 281, which holds that inferences from inferences and presumptions resting on the basis of another presumption are not permissible.

Such decision is also in conflict with the applicable decisions of this Court in **Bollenbach v. United States**, 326 U. S. —, 66 S. Ct. 402; **Tot v. United States**, 319 U. S. 463; **United States v. Falcone**, 311 U. S. 205; and **Direct Sales, Inc., v. United States**, 319 U. S. 703.

The presumptions in this case are unreasonable, and there is no logical connection based upon common knowledge, reason, and experience between the proven facts and the inferred facts. Petitioners were required by the Circuit Court of Appeals to explain transactions which had no incriminating tendencies. Petitioners could legally sell in any quantity. Substantial quantities of liquor are often purchased by others than trade buyers. It is an everyday occurrence for liquor dealers to sell extremely large quantities to purchasers who use the same for weddings,

engagement parties, and debuts, as well as for holiday gifts. Other purchasers make unusually large purchases to provide against possible liquor shortage. The fact that some purchasers could not later be found is not of itself material, since petitioners made no deliveries and recorded the names and addresses furnished by the purchasers to the clerks making the sales. Petitioners did not knowingly record an incorrect name or address and there is no duty imposed upon them by statute or regulation requiring any investigation.

V.

The decision of the Circuit Court of Appeals for the Eighth Circuit that the charge to the jury was fair and adequate is in conflict with the applicable decision of this Court in **Screws v. United States**, 325 U. S. 91, which holds that even in the absence of any exception it is the duty of the trial court to fairly submit the essential ingredients of the offense. The trial court merely quoted the indictment and the statute, and then stated the issue as follows (without further guide, clarification or explanation or even submitting to the jury the inferences which the Circuit Court of Appeals held "permissible"):

> "Now, gentlemen, that statute in substance provides, that is, the language just referred to and quoted:
>
> > " 'To engage in the business of purchasing for resale at wholesale intoxicating liquors,'
>
> means the purchasing for resale at wholesale to purchasers who make the purchase for the purpose of selling intoxicating liquor. There is apparently no issue in this case, or claim that they have a basic permit. There is no dispute about the fact that they had the right, under their wholesale liquor dealer's permit, to sell intoxicating liquors in excess of five

> gallons. The issue, boiled down, is the charge by the Government that they sold intoxicating liquors at wholesale for resale purposes, and that charge is denied by the defendants."

And this was the entire instruction of the Court on the subject matter of the offense charged (R. 265, 266).

The trial court thus ruled in effect as a matter of law that if the jury found such sales, then petitioners were conclusively presumed to have purchased the liquor for sale to trade buyers and hence to have violated the statute.

The decision of the Circuit Court of Appeals approving the charge of the trial court is also in conflict with the applicable decisions of this Court in **M. Kraus & Bros., Inc., v. United States**, decided March 25, 1946, and **Bollenbach v. United States**, 326 U. S. —, 66 S. Ct. 402, which hold that the trial court has the duty to give the jury proper guidance by a lucid statement of the relevant legal criteria, and that a conviction ought not to rest on an equivocal direction to the jury on a basic issue.

PRAYER.

Wherefore your petitioners respectfully pray that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit commanding said Court to certify to this Court a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals for the Eighth Circuit had in the case numbered and entitled on its docket cause No. 13032, Criminal, Meyer Eastman, alias "Meyer Esstman," and Dave Marglous, Appellants, v. United States of America, Appellee, to the end that the

judgment and decision of said Circuit Court of Appeals in the within described cause may be reviewed by this Court as provided by law, and that the judgment herein of said Circuit Court of Appeals for the Eighth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

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